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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 677

CONTINENTAL BAKING COMPANY, GENERAL BAKING COMPANY, SCHULZE BAKING COMPANY, ET AL., APPELLANTS,

vs.

HARRY H. WOODRING, AS GOVERNOR OF THE STATE OF KANSAS, ET AL., ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS

FILED FEBRUARY 3, 1932

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[fols. a & 1] Citation in usual form showing service on Roland Boynton et al., filed Jan. 9, 1932, omitted in printing.

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IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, FIRST DIVISION

No. 1444-N

CONTINENTAL BAKING COMPANY, a Corporation; GENERAL BAKING COMPANY, a Corporation; SCHULZE BAKING COMPANY, a Corporation, and CARLE WILKE, Doing Business as the Wilke Baking Company, Petitioners,

vs.

HARRY H. WOODRING, as Governor of the State of Kansas; Roland Boynton, as Attorney General of the State of Kansas; Jesse W. Greenleaf, Thurman Hill, and Charles W. Campbell, as Members of the Public Service Commission of the State of Kansas, Defendants

BILL OF COMPLAINT—Filed Sept. 21, 1931

To the Honorable Judges of the District Court of the United States for the District of Kansas, First Division:

Come now the petitioners in the above entitled cause and for a cause of action against the above named defendants, Harry H. Woodring, as Governor of the State of Kansas, Roland Boynton, as Attorney General of the State of Kansas, Jesse W. Greenleaf, Thurman Hill and Charles W. Campbell, as members of the Public Service Commission of the State of Kansas, respectfully allege:

1. That your petitioner, Continental Baking Company, is and at all times herein mentioned was a citizen and resident of these United States, and a corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business in the City of New York, County of New York, State of New York. That petitioner, Continental Baking Company, is engaged in the business of manufacturing bread and other bakery products at plants owned by it and located in the

City of Wichita, County of Sedgwick, State of Kansas; the City of St. Joseph, County of Buchanan, State of Missouri; and the City of Kansas City, County of Jackson, State of Missouri.

[fol. 4] 2. That your petitioner, General Baking Company, is and at all times herein mentioned was a citizen and resident of these United States and a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in the City of New York, County of New York, State of New York. That petitioner, General Baking Company, is engaged in the business of manufacturing bread and other bakery products in plants owned by it and located in the City of Wichita, County of Sedgwick, State of Kansas; City of Hutchinson, County of Reno, State of Kansas; City of Kansas City, County of Wyandotte, State of Kansas; and the City of Kansas City, County of Jackson, State of Missouri.

3. That your petitioner, Schulze Baking Company is and at all times herein mentioned was a citizen and a resident of these United States, and a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in the City of Chicago, County of Cook, State of Illinois. That petitioner, Schulze Baking Company, is engaged in the business of manufacturing bread and other bakery products at a plant owned by it and located in the City of Kansas City, County of Jackson, State of Missouri.

4. That your petitioner Carl Wilke, doing business as the Wilke Baking Company, is and at all times herein mentioned was a citizen and resident of these United States, residing in Beatrice, County of Gage, State of Nebraska, and engaged in the business of manufacturing bread and other bakery products in a plant owned by him and located in the town of Beatrice, County of Gage, State of Nebraska.

5. That the defendant, Harry H. Woodring, as Governor of the State of Kansas is, was and at all times hereinafter mentioned the duly elected, qualified and acting Governor of the State of Kansas, located in the City of Topeka, County of Shawnee, State of Kansas.

[fol. 5] 6. That defendant, Roland Boynton, as Attorney General of the State of Kansas, is and was at all times hereinafter mentioned the duly elected, qualified and acting Attorney General of the State of Kansas, and located in the City of Topeka, County of Shawnee, State of Kansas.

7. That defendants, Jesse W. Greenleaf, Thurman Hill, and Charles W. Campbell, as Members of the Public Service Commission of the State of Kansas, are and were at all times hereinafter mentioned the duly appointed, qualified and acting members of the Public Service Commission of the State of Kansas, and located in the City of Topeka, County of Shawnee, State of Kansas.

8. That the amount in controversy between each of the petitioners and each of the defendants herein exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

9. That the jurisdiction of this court is invoked because and by reason of the attempt to deprive petitioners under color of law, statute and regulation of the State of Kansas of rights, privileges and immunities secured them by the constitution of the United States, and rights secured by the laws of the United States providing for equal rights of citizens of the United States, and of all persons within the jurisdiction of the United States, and because of the attempt to deprive petitioners of certain rights arising under the laws regulating commerce, and between citizens of one state and a foreign state, its citizens and subjects.

10. Petitioners further allege that they are now and have for many years past been the owners of the manufacturing plants hereinbefore set forth, and at said plants have manufactured bread and other bakery products, and that from said plants they have delivered bread and other bakery products sold by them by means of motor vehicles in the [fol. 6] cities in which the bread and other bakery products are manufactured, and to customers in cities and points outside of the cities in which their plants are located and within and beyond a radius of twenty-five miles from the corporate limits of said cities in which their plants are located, and that your petitioners, Continental Baking Company, General Baking Company, Schulze Baking Com-

pany and Carl Wilke, doing business as Wilke Baking Company, have and for many years past been delivering bread and other bakery products manufactured in their plants outside of the State of Kansas to customers within the State of Kansas located within and beyond a radius of twenty-five miles from their plant and within a radius of twenty-five miles from the corporate limits of the city in which their plant is located and within and beyond a radius of twenty-five miles from the state line of the State of Kansas and the state in which their plants are located.

11. Your petitioners further allege that the amount of business done by petitioners in the State of Kansas each year amounts to many thousands of dollars per plant, and in each plant is greatly in excess of Three Thousand ($3,000) Dollars, exclusive of interest and costs.

12. Your petitioners further allege that during the year 1931 the legislature of the State of Kansas duly convened and in session passed and enacted Senate Bill 387, which is an act relating to the transportation by motor vehicles over public highways of the State of Kansas, and that the legislature of Kansas repealed all parts of Chapter 206 of the Laws of 1925, and Chapter 222 of the Laws of 1929, being Sections 66-196 to 66-1107 inclusive of the Laws of 1930, Supplement to the Revised Laws of Kansas 1923, [fol. 7] inconsistent or in conflict with Senate Bill 387. That said Senate Bill 387 by said act of the Legislature of the State of Kansas became Chapter 236 of the Laws of 1931 of the Laws of Kansas, and is now the statutory enacted law of the State of Kansas relating to motor carriers and the transportation thereon over the public highways.

13. Your petitioners further state that said Chapter 236 of the Laws of 1931 of the State of Kansas, the same being Senate Bill 387 as passed by the Legislature of the State of Kansas, was approved and signed by defendant, Harry H. Woodring, as Governor of the State of Kansas, and approved by defendant, Roland Boynton, as Attorney General of the State of Kansas, and is now in effect in the State of Kansas as the statutory law of that state.

14. Your petitioners allege that said Chapter 236 of the Laws of 1931 of the State of Kansas, the same being Senate

Bill 387, violates the provisions of the Constitution of the United States and the Amendments thereto in that; it is unreasonable, arbitrary, and discriminatory; it compels private carriers of property against their will to assume the duties and burdens of common carriers; it deprives petitioners of property without due process of law; it impairs the obligations imposed upon plaintiffs by their respective contracts which they and each of them have with customers in the State of Kansas; it compels petitioners to submit to the provisions of the act and pay taxes and charges to the State of Kansas while at the same time it exempts privileged classes, to-wit: owners of live stock and farm products engaged in transporting the same to market, or transporting supplies for their own use in their own automobiles; it compels said petitioners to submit to the provisions of this act to pay taxes and charges for the use of the highways, for the support of the Public Service Commission of the State of Kansas, while it at the same time exempts from all these burdens motor carriers operating [fol. 8] wholly within any city or village in the State of Kansas, or private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of such city or village; it requires private carriers of property to submit to all regulations and rules of the act and as promulgated by the Public Service Commission of the State of Kansas in the same manner as though they were common carriers and carriers engaged solely in intra-state commerce, and places the same burdens upon private carriers of property as upon common carriers; it requires petitioners to maintain schedules, submit their books for inspection, and conduct their business subject to rules and regulations of the Public Service Commission of Kansas, and subjects petitioners for failing to comply with said act to penalties, charges, prosecutions and imprisonment; it requires of petitioners the above requirements even though their place of business and property is located outside the State of Kansas.

15. Your petitioners further allege that they and each of them sells and delivers bread and other bakery products manufactured by it or him as set forth above to it or his customers in the State of Kansas in motor vehicles as defined by said act in Section 1, sub-head a of said law and

act, and over the public highways of the State of Kansas as defined by said section, sub-head g of said law and act. That the bread and bakery products so manufactured, sold and delivered by petitioners are delivered in motor vehicles owned by and the private property of each petitioner; that each petitioner sells and delivers and transports only the products of its own bakery in said motor vehicles; that no passengers except the employees of petitioners engaged in operating and delivering petitioners' products are carried in said motor vehicles; that no property of others than petitioners is transported in said motor vehicles; that petitioners are not public motor carriers of property, contract motor carriers of property, public motor carriers of passengers, contract motor carriers of passengers, as defined by Section 1, sub-heads, b, c, e, and f of Chapter 236 of the [fol. 9] Laws of 1931 of the State of Kansas, and that the term "motor vehicle" herein is used as is defined by Section 1, sub-head a of said Chapter 236. That no extra charge is made to consumers and customers of petitioners for the delivery in motor vehicles over the highways of Kansas of the products of petitioners' plants as a transportation charge.

16. Your petitioners further allege that they and each of them are private motor carriers of property as defined by said Act, Section 1, sub-head d of said law and act.

17. Your petitioners further allege with respect to Section 2 of said law and act that said section of said act deprives the petitioners of property without due process of law; denies petitioners the equal protection of the law as guaranteed by the constitution of the United States and the Fourteenth Amendment thereto, in that it compels said petitioners to submit to the provisions of this act and pay charges and taxes for the use of the highways and in support of the Public Service Commission of the State of Kansas, and subjects them to fines, charges and imprisonment for failing so to do, while at the same time it exempts from all of these burdens motor carriers in the transportation of live stock and farm products to market by the owners thereof, or supplies for his own use in his own motor vehicle, or to the transportation of children to and from school; in that it exempts from the operation of this

act and said charges, taxes, prosecutions, fines and burdens private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of any city or village.

Your petitioners further allege that said Section 2 is arbitrary, discriminatory and void for uncertainty as between the different plants and location thereof of petitioners and others in that (a) said Act does not provide whether petitioners are free from taxation only in the city in which the plant is located or in the city in which the motor vehicle of petitioners operate; (b) whether the radius of twenty-five miles exempted is a radius free from taxation or becomes a taxable radius when the motor [fol. 10] vehicle exceeds the twenty-five mile limit, and then whether or not the entire trip of the motor vehicle is subject to taxation or only the excess mileage; (c) whether the motor vehicles from plants of petitioners located without the State of Kansas are taxable on entering the State of Kansas, and if so, whether or not they are taxable at the point of entry, taxable at a uniform point of entry, or taxable at the nearest point of entry into the State of Kansas. (d) Or entitled to a free radius of twenty-five miles, and if so, whether the same is from the point of entry in the State, a uniform point of entry in the State, or the nearest point of entry in the State of Kansas.

Petitioners further allege that said Section 2 of said law and act is discriminatory, arbitrary and void, under Section 2 of Article IV of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States, the due process of law clause and equal protection clause thereof, in that it discriminates between petitioners and their plants located outside the State of Kansas and the plants of bakers of similar products located in the State of Kansas in that a radius not subject to taxation of twenty-five miles is given plants located in the State of Kansas and no such radius is given to plants located outside the State of Kansas.

18. Your petitioners further allege with respect to sections 4, 5, and 8 of said law and act, that said sections 4, 5, and 8 of said act are unconstitutional, discriminatory, arbitrary and void in that they make no distinction between common carriers of property and private carriers of prop-

erty such as petitioners. That said State Commission is explicitly invested with authority to supervise petitioners, which embraces within its definition the right to regulate their business and service, inspect and prescribe their method of keeping books which should set up adequate depreciation charges, and generally to make rules govern- [fol. 11] ing their operations, schedules of operation, and the right to suspend petitioners' business for failure to comply with said law and act or rules and regulations promulgated by said Public Service Commission, etc. Said act provides that all carriers within the act whether public or private are put by the terms of the statute precisely on the same footing. That all must obtain licenses of public convenience and necessity upon application and conditions. Said act while not in its express terms gives the Public Service Commission the power to demand that private carriers of property shall constitute themselves common carriers and the statute purports to subject all carriers within the terms of its definition to the same obligation. That said sections unreasonably require petitioners private carriers of property, to submit information to the Commission over which the Commission could have no power to require or right to have. That they place upon petitioners, who are private carriers of property, all of the burdens of common carriers. Said act is therefore unconstitutional and void in violation of the Const-tution of the United States and the Fourteenth Amendment thereof by taking property without due process of law in violation of the Constitution of the United States, Article I, Section 8 regulating interstate commerce.

19. Petitioners allege with respect to Section 13 of said law and act that said law and act provides an arbitrary tax based upon twice the amount of tonnage of the vehicle employed by petitioners, and makes no provision for the difference between a loaded truck, requiring petitioners to pay the same compensation for the empty trucks that they would be compelled to pay were said trucks loaded double their maximum capacity. That said section is unreasonable, unjust, arbitrary and denies petitioners the equal protection of the law and takes petitioners' property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and is void.

[fol. 12] 20. Petitioners allege with respect to sections 15, 16, 17 and 19 of said law and act that said sections are unconstitutional and void for the reasons set forth in paragraph 18 of petitioners' petition herein, and for the further reason that said sections subject petitioners, their servants, agents and employees to fine and their property subject to attachment for failure to conform to and abide by the provisions of said act, all in violation of the Fourteenth Amendment to the Constitution of the United States.

21. Petitioners further allege with respect to section 21 of said law and act, that said section is in violation of the Constitution of the United States and the Fourteenth Amendment thereof and in violation of Article I, section 8 of the Constitution of the United States as set forth in paragraph 18 of petitioners' petition, and for the further reason that it requires and compels petitioners to take out insurance on property carried wholly in interstate commerce. And further under said act, and section 21 thereof, certain privileged classes in Section 2, and also in Section 21, are exempted from the requirement of obtaining bond and of paying for and obtaining in-urance required of petitioners, which is violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, and of Section 2 of Article IV of the Constitution of the United States.

22. Petitioners further allege with respect to Section 22 of said law and act that said section is in violation of the Constitution of the United States and Article I, of section 8 thereof, and the Fourteenth Amendment thereto for the reasons set forth in paragraph 18 of petitioners' petition herein.

23. Petitioners further allege that the act hereinbefore described, Chapter 236 of the Laws of 1931 of the State of Kansas, Senate Bill 387, as passed by the Legislature of the State of Kansas, became effective and in full force and effect the 1st day of July, 1931, and defendants herein and each of them as officers of the State of Kansas, charged [fol. 13] with the duty of enforcing the law, notified petitioners to comply with the act, and through their agents, servants and employees arrested and are threatening to

arrest petitioners, their agents, servants and employees on the public highways of the State of Kansas, requiring them to comply in all respects with the terms and provisions of this act.

24. A copy of the laws of Kansas of 1931, Chapter 236, being Senate Bill 387, is hereto attached and made a part hereof and marked Exhibit "A".

25. Petitioners further allege that if they are not permitted to deliver bread and other bakery products manufactured by them in motor vehicles as hereinbefore alleged because of the enforcement of said acts and each of them by the defendants herein and the law enforcement officers of the State of Kansas, they will suffer great and irreparable loss in that they will be unable to carry out the orders for said products placed with them and other and competing concerns will secure the business. That petitioners will violate the terms of their sales contracts and petitioners will be subject to suits for damages and the cancellation of their contracts. That the business of petitioners is such that the interruption thereof for a single day will practically destroy the entire business of petitioners, which will work a great hardship on petitioners and upon the food supply of individual citizens of the State of Kansas. That the same will result in immediate and irreparable loss to these petitioners. If said acts are enforced and unless petitioners fully comply with same, their property will be confiscated by the Public Service Commission and petitioners' plants will be closed down and their business lost and destroyed.

26. That petitioners are without a plain, adequate and complete remedy at law in the premises except in a suit of this nature, and by injunction issued by this court only can they be protected in their personal and property rights as aforesaid and saved from immediate damage and irreparable financial loss. That immediate and irreparable injury [fol. 14] will result to your petitioners if a restraining order is not forthwith issued restraining the enforcement of said Chapter 236 of the Laws of Kansas, 1931, the same being Senate Bill 387.

Wherefore your petitioners respectfully pray to the court that a summons be issued forthwith to said defendants to

answer petitioners' petition herein; that the said defendants, Harry H. Woodring, as Governor of the State of Kansas, Roland Boynton, as Attorney General of the State of Kansas, Jesse W. Greenleaf, Thurman Hill and Charles W. Campbell as members of the Public Service Commission of the State of Kansas, and every one of their officers, agents and employees and those acting in concert with them be enjoined from enforcing said law and act aforesaid; that a temporary restraining order be issued forthwith restraining the enforcement of said statute until such time as the court may hear and determine upon the issuance of a temporary injunction and that a temporary injunction with temporary restraint meantime be granted, restraining the enforcement of said statute as aforesaid; that upon hearing the same be made a final order, and that petitioners have all other and further proper relief that may to the court seem just and proper.

R. L. Stephens, Charles R. Wilke, John C. Grover,
Attorneys for Petitioners.

Duly sworn to by C. B. Hoff. Jurat omitted in printing.

[fol. 15] EXHIBIT "A" TO BILL OF COMPLAINT

Chapter 236, Laws of 1931

Relating to Motor Carriers and to Transportation Thereon Over the Public Highways

Senate Bill No. 387

An Act relating to transportation by motor vehicles over the public highways of Kansas, and repealing all parts of chapter 206 of the Laws of 1925 and chapter 222 of the Laws of 1929 (being sections 66-196 to 66-1,107, inclusive, of the 1930 Supplement to the Revised Statutes of Kansas, 1923), inconsistent or in conflict with this act

Be it enacted by the Legislature of the State of Kansas:

Section 1. (*a*) The term "motor vehicle" when used in this act means any automobile, automobile truck, trailer, motor bus, or any other self-propelled or motor-driven

vehicle used upon any public highway of this state for the purpose of transporting persons or property. (*b*) The term "public motor carrier of property" when used in this act shall mean any person engaged in the transportation by motor vehicle of property for hire as a common carrier having a fixed termini or route. (*c*) The term "contract motor carrier of property" when used in this act shall be construed to mean any person not a public motor carrier of property engaged in the transportation by motor vehicle of property for hire as a business. (*d*) The term "private motor carrier of property" when used in this act shall be construed to mean any person engaged in the transportation by motor vehicle of property sold or to be sold by him in furtherance of any private commercial enterprise. (*e*) The term "public motor carrier of passengers" when used in this act shall mean any person engaged in the transportation by motor vehicle of passengers or express for hire as a common carrier having a fixed termini or route. (*f*) The term "contract motor carrier of passengers" when used in this act shall be construed to mean any person not a public motor carrier of passengers engaged in the transportation by motor vehicle of passengers or express for hire. (*g*) The term "public highway" when used in this act shall mean every public street, road or highway or thoroughfare of any kind used by the public.

Sec. 2. That this act shall not apply to motor carriers who shall operate wholly within any city or village of this state, or private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of such city, or any village, nor to the transportation of live stock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle; or to the transportation of children to and from school.

Sec. 3. All "public motor carriers of property or passengers" as defined in this act are hereby declared to be common carriers within the meaning of the public utility laws of this state, and are hereby declared to be affected with a public interest and subject to this act and to the laws of this state, including the regulation of all rates and charges now in force or that hereafter may be enacted, pertaining to public utilities and common carriers as far as applicable, and not in conflict herewith.

[fol. 16] Sec. 4. No public motor carrier of property or passengers, contract motor carrier of property or passengers or private motor carrier of property shall operate any motor vehicle for the t-ansportation of either persons or property for compensation on any public highway in this state except in accordance with the provisions of this act.

Sec. 5. The public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers in this state and to fix and approve reasonable maximum or minimum or maximum and minimum rates, fares, charges, classifications and rules and regulations pertaining thereto. And the public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers, contract motor carrier of property or of passengers and private motor carrier of property in the state and to regulate and supervise the accounts, schedules, service and method of operation of same; to prescribe a uniform system and classification of accounts to be used; to require the filing of annual and other reports and any other data; and to supervise and regulate "public motor carriers of property or of passengers," "contract motor carriers of property or of passengers" and "private motor carriers of property," in all matters affecting the relationship between such "public motor carriers of property or of passengers," "contract motor carriers of property or of passengers" and "private motor carriers of property" and the traveling and shipping public. The public service commission shall have power and authority by general order or otherwise to prescribe reasonable and necessary rules and regulations governing all such motor carriers. All laws relating to the powers, duties, authority and jurisdiction of the public service commission over common carriers are hereby made applicable to all such motor carriers except as herein otherwise specifically provided.

Sec, 6. All transportation charges made by any public motor carrier shall be just and reasonable.

Sec. 7. It shall be unlawful for any public motor carrier to operate as a carrier of intrastate commerce within this

state without first having obtained from the public service commission a certificate of convenience and necessity. The public service commission, upon the filing of application for such certificate, shall fix a time and place for hearing thereon, which shall not be less than twenty nor more than thirty days after such filing. The public service commission shall cause a copy of such application and notice of hearing thereon to be served at least ten days before the hearing upon an officer or owner of every common carrier that is operating or has applied for a certificate to operate in the territory proposed to be served by the applicant, and on the city clerk of every city into or through which said motor carrier may desire to operate; and any such common carrier or city is hereby declared to be an interested party to said proceedings and may offer testimony for or [fol. 17] against the granting of such certificate, and any other interested person may offer testimony at such hearing. If the commission finds from the evidence that the proposed service or any part thereof will promote the public convenience and necessity, the commission shall issue the certificate; otherwise such certificate shall be denied. Before granting a certificate to a public motor carrier, the commission shall take into consideration other existing transportation facilities in the territory for which a certificate is sought, and in case it appears from the evidence that the service furnished by existing transportation facilities is reasonably adequate, the commission shall not grant such certificate.

Sec. 8. It shall be unlawful for any "contract motor carrier of property or passengers" or "private motor carrier of property" to operate as a carrier of property or passengers within this state either in intrastate commerce or in interstate commerce without first having obtained from the public service commission a license therefor. An application shall be made to the public service commission in writing stating the ownership, financial condition, equipment to be used and physical property of the applicant, and such other information as the commission may request. Upon receipt of such information and on compliance with the regulations and payment of fees, the public service commission shall issue a license to such applicant.

Sec. 9. It shall be unlawful for any public motor carrier to operate as a common carrier of interstate commerce within this state, without first having furnished the public service commission in writing full information concerning: (*a*) The ownership, financial condition, equipment to be used and physical property of the applicant; (*b*) the complete route over which the applicant desires to operate; (*c*) the proposed rates, schedule or schedules and/or time cards of the carrier; (*d*) such other information as the commission may request covering observance of state police regulations and payment of fees. Upon receipt of such information and payment of fees the commission shall issue such interstate carrier a license.

Sec. 10. The public service commission shall prescribe forms of applications for certificates and licenses for the use of prospective applicants and shall make regulations for the filing thereof. The commission may designate one of its attorneys to take evidence at the hearing of any application for a certificate or license and submit findings of fact to the commission.

Sec. 11. Where a certificate or license shall have been regularly issued, and thereafter the carrier to whom the same shall have been issued, not being in default in the performance of any of the terms of this act, shall transfer or assign such certificate or license to another qualified hereunder, such certificate or license shall, upon application, be, by the commission, transferred to such assignee upon compliance by the latter with the terms of this act. Subject to [fol. 18] any right a holder of any such certificate or license may have to engage in interstate commerce, no license or certificate issued in accordance with the terms of this act shall be construed to be either a franchise or irrevocable.

Sec. 12. No public motor carrier authorized by this act to operate shall discontinue any service established by this act without an order of the public service commission granted only after hearing upon due notice.

Sec. 13. In addition to the regular license fees or taxes imposed upon "public motor carriers of property or of passengers," "contract motor carriers of property or of passengers," and "private motor carriers of property,"

there shall be assessed against and collected from every such carrier a tax of five tenths mill per gross ton mile for the administration of this act and for the maintenance, repair and reconstruction of the public highways. The said gross ton mileage shall be computed: (*a*) The maximum seating capacity of each passenger carrying vehicle shall be estimated at 150 pounds per passenger seat; to this sum shall be added the weight of the vehicle, the total shall then be multiplied by the number of miles operated, and the amount thus obtained divided by 2,000; (*b*) 200 per cent of the rated capacity of each property carrying vehicle plus the weight of the vehicle shall be multiplied by the number of miles the vehicle is operated, and the amount thus obtained divided by 2,000.

Sec. 14. Motor carriers operating under a certificate and having paid their fees for the year 1931 shall receive credit for so much of the fees as have been paid under section 6 of chapter 206 of the Laws of 1925 for the last half of the year 1931.

Sec. 15. Every motor carrier to which this act applies shall keep daily records upon forms prescribed by the commission of all vehicles used during the current month. On or before the 25th day of the month following, they shall certify under oath to the commission, upon forms prescribed therefor, summaries of their daily records which shall show the ton miles traveled during the preceding month, and such other information as the commission may require. The daily records shall be filed and preserved for a period of at least three years, and thereafter until permission for their destruction shall have been given by the commission. Any person who shall wilfully under oath make a false return to the commission shall be deemed guilty of perjury.

Sec. 16. The commission is hereby empowered to administer and enforce all provisions of this act, to inspect the books and documents of all carriers to which this act applies, and to expend such amount of the sum collected hereunder as is necessary for such purposes upon requisition by the commission to the state auditor: Provided, however, The total sum to be expended as provided in this section shall not exceed during the calendar year twenty

per cent of the total gross sum collected under this act. It [fol. 19] shall be the duty of the state treasurer to hold in reserve twenty per cent of all moneys collected hereunder during the calendar year for the purpose of meeting such expenditures.

Sec. 17. On or before the 25th day of each month all motor carriers shall pay to the commission *on* the amount of the fees due from them for the preceding month. If payment is not made on or before said date there shall be added as a penalty a sum equal to one and one-half per cent per month of the amount of the original fee. Said fees and penalties not paid on said date shall constitute a lien upon all the personal property of the delinquent carrier, and also upon the vehicles of all persons leased by it in its business, and thereupon said property and vehicles may be held under warrant issued by the commission and may be sold in accordance with the law applicable to personal property taxes. In addition thereto, such delinquency shall be a ground for the issuance of writ of attachment by any court of record against the carrier, and for the suspension or revocation by the commission of the certificate or license; said suspension or revocation may be ordered after a hearing by the commission held after a notice of not less than five days to all parties interested. The commission shall enforce collection of all fees and penalties provided in this act, and daily remit to the state treasurer the proceeds thereof.

Sec. 18. All moneys received under the provisions of this act shall be distributed: (*a*) For administration and enforcement of the provisions of this act, twenty per cent shall be held by the state treasurer for the use of the public service commission; (*b*) the balance the said treasurer shall place to the credit of the highway fund of the state and it shall become a part thereof.

Sec. 19. Any person who shall operate as any carrier to which this act applies without first obtaining a certificate or license or in violation of any of the terms thereof, or who fails to make any return or report required by this act or by the commission hereunder, or who denies to the commission access to his books or records, shall be guilty of a

misdemeanor and shall be punished as hereinafter provided.

Sec. 20. The commission is empowered to expend such money as may be necessary for the administration and enforcement of this act, but said sum shall not exceed the twenty per cent allowed to the commission in subparagraph (*a*) of section 18 hereof.

Sec. 21. No certificate or license shall be issued by the public service commission to any "public motor carrier of property," "public motor carrier of passengers," "contract motor carrier of property or passengers" or "private motor carrier of property," until and after such applicant shall have filed with, and the same has been approved by, the public service commission, a liability insurance policy in some insurance company or association authorized to transact business in this state, in such reasonable sum as the commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property [fol. 20] involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier. No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state.

Sec. 22. The commission shall promulgate and publish in the official state paper, and mail to each holder of a certificate or license hereunder, such regulations as it may deem necessary to properly carry out the provisions and purposes of this act. The commission may at any time, for good cause, suspend, and, upon at least five days' notice to the grantee of any certificate and an opportunity to be heard, revoke or amend any certificate. Upon the commission finding that any public carrier does not give convenient, efficient and sufficient service as ordered, such public carrier shall be given a reasonable time to provide such service before any existing certificate is revoked or a new certificate granted. Any rules promulgated by the commission shall include: (*a*) Every vehicle unit shall be maintained in a safe and sanitary condition at all times.

(*b*) Every operator of a motor vehicle used as a public carrier shall be at least twenty-one years of age; and every operator of other carriers to which this act applies shall be at least sixteen years of age; and all such operators shall be of good moral character and fully competent to operate the motor vehicle under his charge. (*c*) Hours of service for operators of all motor carriers to which this act applies shall be fixed by the commission. (*d*) Accidents arising from or in connection with the operation of carriers shall be reported to the commission in such detail and in such manner as the commission may require: Provided, That the failure to report any such accident within five days after the happening thereof shall be deemed willful refusal to obey and comply with a rule of the commission. (*e*) The commission shall require and every carrier shall have attached to each unit or vehicle such distinctive marking as shall be adopted by the commission.

Sec. 23. Every carrier to which this act applies and every person who violates or procures, aids or abets in the violating of any provision of this act, or who fails to obey any order, decision or regulation of the commission, or who procures or aids or abets any person in his failure to obey such order, decision or regulation, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding $500. The inspectors designated by the commission shall have all the lawful powers of peace officers to enforce this act in any county or city of this state.

Sec. 24. It shall be the duty of the county attorneys to prosecute all violations of this act.

Sec. 25. Certificates issued to public carriers by the commission under the authority of chapter 206 of the Laws of 1925 shall remain in effect hereunder.

[fol. 21] Sec. 26. All parts of chapter 206 of the Laws of 1925 and chapter 222 of the Laws of 1929 (being sections 66-196 to 66-1,107, inclusive, of the 1930 Supplement to the Revised Statutes of Kansas, 1923), inconsistent or in conflict with this act are hereby repealed.

Sec. 27. This act shall take effect and be in force from and after July 1, 1931, and publication in the statute book.

[File endorsement omitted.]

[fol. 22] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER—Filed Sept. 22, 1931

Now on this 22nd day of September, 1931, there came on for hearing the verified bill of complaint of petitioners, Continental Baking Company, a corporation, General Baking Company, a corporation, Schulze Baking Company, a corporation, and Carl Wilke, doing business as the Wilke Baking Company, praying for the immediate issuance of a restraining order directed to Harry H. Woodring, as Governor of the State of Kansas, Roland Boynton, as Attorney General of the State of Kansas, Jesse W. Greenleaf, Thurman Hill and Charles W. Campbell as members of the Public Service Commission of the State of Kansas, and their officers, agents, representatives and employees, restraining them from enforcing Chapter 236 of the Laws of 1931 of the State of Kansas, the same being Senate Bill 387, which imposes certain restrictions, a license fee, reports, returns and other obligations therein set forth in the operation of their motor vehicles as defined by said act in the delivery of their personal property as private motor carriers of property as defined by said act in the State of Kansas, and after due consideration the court finds that the enforcement of said act and law and the manner of enforcement thereof should be restrained pending a hearing upon an application for a temporary injunction, and the petitioners' prayer for a restraining order should be granted.

It is therefore ordered, adjudged and decreed that the defendants, Harry H. Woodring, as Governor of the State of Kansas, Roland Boynton, as Attorney General of the State of Kansas, Jesse W. Greenleaf, Thurman Hill and Charles W. Campbell, as members of the Public Service [fol. 23] Commission of the State of Kansas, their officers, agents and all persons acting for them in concert with them be and they are hereby each and every one of them restrained from enforcing the aforesaid law and act as against Continental Baking Company, General Baking Company, Schulze Baking Company, and Carl Wilke doing business as the Wilke Baking Company, or their agents, servants or employees, and from arresting, trying or causing

to be arrested and tried under said laws and act any employee, representative or agent of said Continental Baking Company, General Baking Company, Schulze Baking Company and Carl Wilke doing business as the Wilke Baking Company.

Be it further ordered that the petitioners give security in the sum of One Thousand ($1,000) Dollars to be approved by the Clerk, conditioned upon the payment of such costs and damages as may be incurred by any person wrongfully enjoined or restrained hereby, this restraining order to be effective upon the giving of said security.

Be it further ordered, adjudged and decreed that the matter of the issuance of a temporary injunction be and it is hereby set for hearing on the 9th day of October, 1931.

Richard J. Hopkins, Judge.

[File endorsement omitted.]

[fols. 24 & 25] Bond on restraining order for $1,000, approved and filed September 22, 1931, omitted in printing.

[fol. 26] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed Sept. 24, 1931

Comes now the undersigned defendants and say that said bill of complaint ought to be dismissed because it appears upon the face of the bill of complaint.

1. That the said bill of complaint does not make out or state such a cause as to entitle the complainants, or any of them, to the relief prayed for, or any relief.

2. That it is not shown from the averments of the said bill of complaint that the statutes challenged are as a matter of law in contravention of any designated provision of a federal constitution, but on the contrary it appears from the averments of the said bill of complaint that the statutes challenged are as a matter of law valid and proper exercise by the State of Kansas of its police power.

3. That the allegations of fact in the said bill of complaint are not suffcient to show that the statutes challenged are in contravention of the power of Congress to regulate commerce among the several States; nor do the allegations of the bill show any real burden imposed by said acts on interstate commerce; nor show any denial of right or deprivation of property as to the complainants, or any of them.

Wherefore defendants pray that the bill of complaint be dismissed and that the costs be taxed to the plaintiffs.

Roland Boynton, Attorney General; Walter Griffin, Assistant Attorney General; Chas. W. Steiger, E. H. Hatcher, Attorneys for the Public Service Commission.

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

NOTICE OF HEARING MOTION TO DISMISS—Filed Sept. 24, 1931

To the above-named plaintiffs and their attorneys of record:

You and each of you are hereby notified that the defendants in the above entitled cause will on Friday, October 9, 1931, at 10 o'clock A. M., or as soon thereafter as the same may be heard, call up for hearing before the three judge court, to be assembled by Honorable Richard J. Hopkins in the court room of the Federal Building at Topeka, Kansas, their motion to dismiss the bill of complaint filed by you in the above entitled cause, a copy of which motion is marked Exhibit "A", attached hereto and made a part hereof.

Roland Boynton, Attorney General; Walter Griffin, Assistant Attorney General; Chas. W. Steiger, E. H. Hatcher, Attorneys for the Public Service Commission.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

REQUEST FOR CONVENING THREE-JUDGE COURT—Filed Sept. 29, 1931

To the Honorable Richard J. Hopkins, of the District Court of the United States for the District of Kansas, First Division:

Comes now the defendant in the above entitled action and requests that a three judge court be convened on the 9th day of October, 1931, at the hour of 10 A. M., or as soon thereafter as the same may be heard, at the Federal Building in Topeka, Kansas, for the purpose of hearing the motion of the defendant to dismiss the bill of complaint filed in the above entitled cause as by statute in such case made and provided.

[fol. 28] Roland A. Boynton, Attorney General; Walter Griffin, Assistant Attorney General; Chas. W. Steiger, E. H. Hatcher, Attorneys for the Commission.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITIONERS' CONSENT TO REQUEST FOR CONVENING THREE-JUDGE COURT—Filed Oct. 2, 1931

To the Honorable Richard J. Hopkins, of the District Court of the United States for the District of Kansas, First Division:

Come now the Petitioners in the aforesaid case and consent to the request of defendants heretofore filed herein that a three judge court be convened on the 9th day of October, 1931, at the hour of 10 A. M. or as soon thereafter as the same may be heard at the Federal Building in Topeka, Kansas, for the purpose of hearing motion of defendants to dismiss the bill of complaint filed in the above entitled cause.

Charles R. Wilke, John C. Grover, Attorneys for Petitioners.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

ORDER DESIGNATING JUDGES AND FIXING DATE OF HEARING OF THREE-JUDGE COURT—Filed Oct. 2, 1931

Petitioners, Continental Baking Company, a corporation, General Baking Company, a corporation, Schulze Baking Company, a corporation, and Carl Wilke, doing business as the Wilke Baking Company, having presented to the undersigned Judge their bill of complaint to enjoin, set aside, annul and suspend Chapter 236 of the Laws of Kansas, 1931, and it appearing that defendants have entered their appearance, and that motion has been made and consented to for the determination by three judges of said cause, and that said bill of complaint is one which requires, under the law, hearing and determination by three judges, one of whom shall be a Circuit Judge, the undersigned, after taking counsel with the Presiding Judge of the United States Circuit Court of Appeals for the Tenth Circuit, and being advised by him that the Honorable George T. McDermott, one of the Judges of Said Circuit Court, had been designated as the Circuit Judge to hear and determine said application, sitting with two other Judges as required by law;

It is therefore ordered that the hearing of the bill of complaint of petitioners Continental Baking Company, a corporation, General Baking Company, a corporation, Schulze Baking Company, a corporation, and Carl Wilke, doing business as the Wilke Baking Company, be and the same is hereby set for hearing October 10th, 1931, at Topeka, Kansas, and that such hearing be had before the Honorable George T. McDermott, Circuit Judge, the Honorable Franklin E. Kennamer, District Judge, and the undersigned, District Judge.

Richard J. Hopkins, District Judge.

[File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT

NOTICE OF HEARING BEFORE THREE-JUDGE COURT—Filed Oct. 3, 1931

To the above-named defendants and their attorneys of record:

You and each of you are hereby notified that the Honorable Richard J. Hopkins of the District Court of the United States of the District of Kansas, First Division, has set the above and foregoing case for hearing before a three judge court at the court room of the Federal Building in Topeka, Kansas, on Saturday, October 10th, 1931, at 10 o'clock A. M. or as soon thereafter as the same may be heard.

Charles R. Wilke, John C. Grover, Attorneys for Petitioners.

Received copy of the above and foregoing notice this 3rd day of October, 1931.

Roland Boynton, Walter Griffin, Chas. W. Steiger, E. H. Hatcher, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 30½] IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—Filed Oct. 10, 1931

Now on this 10th day of October, 1931, comes on for hearing before Hon. Geo. T. McDermott, United States Circuit Judge and Hon. F. E. Kennamer and Hon. Richard J. Hopkins, District Judges, Defendants' Motion to Dismiss the Bill of Complaint herein; Complainants appearing by R. L. Stephens, Charles R. Wilke and John C. Grover, their attorneys; Defendants appearing by Walter T. Griffin, Assistant Attorney General for the State of Kansas, and Chas. W. Steiger and E. H. Hatcher, Attorneys for the Public Service Commission of the State of Kansas, and the Court having heard the arguments of counsel for the respective parties, takes said matter under advisement, with leave to

the parties to file their briefs; thereupon Complainants filed their brief and leave is given to Defendants to file their brief within twenty days from this date and to serve copies on counsel for complainants, and complainants to have ten days thereafter to file their Reply Brief, and thereupon said matter shall be taken as submitted; the restraining order heretofore issued to remain in effect pending the decision on the motion.

Geo. T. McDermott, Judge.

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

Appearances:

For Petitioners: Mr. R. L. Stephens, Mr. Charles R. Wilke, Mr. John C. Grover.

For Defendants: Mr. Roland Boynton, Mr. Walter Griffin, Mr. Chas. W. Steiger, Mr. E. H. Hatcher.

Before McDermott, Circuit Judge, and Kennamer and Hopkins, District Judges

MEMORANDUM OPINION—Filed Dec. 15, 1931

McDERMOTT, Circuit Judge, delivered the opinion of the court.

Chapter 236, of the Laws of 1931, lays a special tax, based on truck capacity and mileage, upon carriers which carry for hire (public and contract carriers) and upon those who are engaged in the transportation by motor vehicle of property sold in furtherance of any commercial enterprise (private carriers). Such taxes must be used for the maintenance, repair and construction of public highways, [fol. 32] and the administration of the act. It requires a public carrier to procure a certificate of convenience before doing an intrastate business; is requires all carriers to procure a license, and to carry liability insurance. It authorizes the public Service Commission to promulgate regulations looking to the safe operation of the vehicles of all carriers. Certain carriers are exempted from the act.

The plaintiffs are "private motor carriers of property" as the same are defined by the act; they operate bakeries both within and without the State of Kansas, and use the highways of Kansas to deliver their products to customers within and beyond a radius of 25 miles from the corporate limits of cities of the state. The plaintiffs seek to enjoin the enforcement of the statute on the ground that it is arbitrary and discriminatory, and that it compels private carriers to assume the burdens of common carriers. A motion of the defendants to dismiss the bill for want of equity is now for decision.

A similar attack was made upon this statute by a "contract carrier", and the statute was held to be good as against that attack by this court, Judges Phillips, Symes and Hopkins sitting. Louis v. Boynton, et al., unreported. We will adhere to the rulings of that court, as far as pertinent, not only because we agree with them, but for the more fundamental reason that courts of coordinate jurisdiction sitting in the same district, must not attempt to overrule the decisions of each other, except for the most cogent reasons. This rule, and its careful observance, are, to use the words of Judge Walter H. Sanborn, "essential to the prevention of unseemly conflicts, to the speedy conclusion of litigation, and to the respectable administration [fol. 33] of the law, especially in the national courts, where many judges are qualified to sit at the trials, and are frequently called upon to act in the same cases." Plattner Implement Co. v. International Harvester Co. (C. C. A. 8) 133 F. 376; Shreve v. Cheesman (C. C. A. 8) 69 F. 785; Boatmen's Bank v. Fritzlen (C. C. A. 8) 135 F. 650.

The State of Kansas has constructed at great expense a system of improved highways. These have been built in part by special benefit districts, and in part by a tax on gasoline sold in the state, and by license fees exacted of all resident owners of automobiles. These public highways have become the roadbeds of great transportation companies, which are actively and seriously competing with railroads which provide their own roadbeds; they are being used by concerns such as the plaintiffs for the daily delivery of their products to every hamlet and village in the state. The highways are being pounded to pieces by these great trucks which, combining weight with speed, are making the

problem of maintenance well-nigh insoluble. The legislature but voiced the sentiment of the entire state in deciding that those who daily use the highways for commercial purposes should pay an additional tax. Moreover, these powerful and speedy trucks are the menace of the highways. That those who use the highways, as the plaintiffs use the highways, are subject to regulation by the state to insure the safety of others on the highways, admits of no dispute. It is likewise settled that such users, although nonresidents and although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. The highways are public property. The amount of the charges and the method of collection are for the state to [fol. 34] determine, so long as they are reasonable and conform to some fair and practical standard. Carley & Hamilton v. Snook, 281 U. S. 66; Bekins Van Lines v. Riley, 280 U. S. 80; Clark v. Poor, 274 U. S. 554; Packard v. Banton, 264 U. S. 140; Kane v. New Jersey, 242 U. S. 160; Hendrick v. Maryland, 235 U. S. 610; Note, 68 A. L. R. 200. We are advised that all of the states of the union, excepting five, have passed statutes undertaking to regulate such special use of their highways and to exact special compensation therefor.

The constitutional questions presented cannot be decided until the statute has been construed. This statute has not yet been construed by the state courts; nor are we aided by any administrative interpretation of the department charged with its enforcement. The statute was construed in Louis v. Boynton, supra, as far as was necessary for the determination of that case; but there remains for this court to construe several sections of the statute.

As in the case of most legislation which is the subject of wide interest and which is amended on the floor and in conference, many questions of construction are raised. Counsel for the plaintiffs make many suggestions which would improve the draftmanship of the bill, as doubtless they will be able to do as to any bill that may be later enacted. We are not aided in our efforts to construe the law by the hypothetical absurdities which are suggested by counsel and which have come to be the conventional method of presenting constitutional questions, for, as was said by the Supreme Court of Oregon in State v. Kozer,

116 Ore. 581, 242 Pac. 620, the constitutionality of a statute cannot be tested by isolated cases conjured up by fertile imagination; it must be tested by

[fol. 35] "Its general application to the classes affected, and not to certain individuals belonging to such classes. Exact equality is not possible. Practical equality is constitutional equality. The human mind has not yet been able to devise any scheme of taxation which will operate with unerring certainty and equality to all situations which may arise. Southwestern Oil Co. v. Texas, 217 U. S. 114; Bell's Gap R'd Co. v. Pennsylvania, 134 U. S. 232."

First looking at the statute as a whole: It is immediately observed that it draws no distinction between residents and nonresidents. Next, it discloses a general intent to levy a reasonable tax for the use of its highways by those who habitually use the highways for business purposes. It divides such users into two general classes, the so-called "public" and "contract" carriers, who are engaged in the business of transportation of property by motor vehicle for hire; and "private" carriers, to which class the plaintiffs belong, who are defined to include "any person engaged in the transportation by motor vehicle of property sold or to be sold by him in furtherance of any private commercial enterprise." The act requires intrastate public carriers to obtain a certificate of convenience and necessity, and provides for the regulation of their charges for services. It requires that private carriers shall apply for a license and furnish certain information, and that upon the receipt of such information and compliance with the regulations, that the license shall be issued. It requires that both public and private carriers conform to certain regulations concerning the safety of the operation of their vehicles, and that both shall provide a bond to indemnify the public against injury. The statute clearly discloses two general plans, one for the control of public carriers, and the other for the control of private carriers. Reading the statute as a whole, there is no difficulty in arriving at the [fol. 36] conclusion that the legislature intended to confine its control of private carriers to matters of taxation and of public safety. The authorities already cited amply sustain the power of the state over all carriers in these two re-

spects. Two principal questions are presented. First is whether certain exemptions contained in Section 2 of the act are so arbitrary and discriminatory that the entire act must fall; and second, whether the act imposes upon private carriers duties and obligations which can only lawfully be imposed upon public carriers. Frost v. Commission, 271 U. S. 583; Smith v. Cahoon, 283 U. S. 553. But see, Stevenson v. Binford (S. D. Texas, 3-Judge Court) decided October 26, 1931.

We will treat first the question of exemptions. Section 2 of the act provides:

"That this act shall not apply to motor carriers who shall operate wholly within any city or village of this state, or private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of such city, or any village, nor to the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle; or to the transportation of children to and from school."

There can be no serious question as far as the exemption applies to those vehicles operating wholly within any city or village of the state. As to private carriers, this is primarily a taxing statute, and since city streets are neither constructed nor maintained by the state, there is no reason why the state should exact a charge for vehicles which do not use the state highways; nor is there as much occasion for the state to enact statutes looking toward their safe operation in localities where such operation may be con- [Vol. 37] trolled by city ordinance. Nor can there be any serious question about the exemption as to the transportation of children to and from schools. This public agency can be fairly exempted from taxation for the same reason that municipal bonds are; the question of the safe operation of such vehicles can be properly left to the school authorities who are directly responsible therefor. Louis v. Boynton, supra, and many state decisions collected in 68 A. L. R. 194.

It is strenuously argued that the legislature has no power to exempt vehicles used in the transportation of livestock and farm products to market by the owner thereof, or supplies for his own use in his own motor vehicle. It is

said that flour mills and packing houses might employ a fleet of trucks and send them to the farm to transport wheat and livestock to the mill or the packing house. They might, but they don't. The legislature knew that as a matter of fact farm products are transported to town by the farmer, or by a nonexempt "contract carrier" employed by him. The legislature knew that as a matter of fact, the use of the highways for the transportation of farm products by the owner is casual and infrequent and incidental; farmers use the highways to transport their produtcs to market ordinarily but a few times a year. The legislature rightly concluded that the use of the highways for carrying home his groceries in his own automobile is adequately compensated by the general tax imposed on all motor vehicles. It is strenuously urged that Smith v. Cahoon, 283 U. S. 553, is contrary. The statute there involved dealt only with carriers engaged in the business of transportation for hire between fixed termini or over regular routes. That statute undertook to exempt from its operation such public carriers as were engaged in the business of transporting farm products. The Supreme Court held that there was no [fol. 38] reasonable ground for distinguishing between two public transportation companies, one of which was engaged in transporting farm products for hire, and another of which was engaged in transporting other products for hire. But because there is no rational distinction between two public carriers because of the nature of the products carried, it does not follow that no rational distinction may exist between two private carriers. Whatever may be the metaphysics of the situation, it is a fact that there is an actual distinction between carriers in the position of the plaintiffs, who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers, and a farmer who hauls his wheat or livetsock to town once or twice a year. As was said by this court in Louis v. Boynton, supra, there is a distinction between those who use the highways but casually, and those who use them habitually and continually. In Carley & Hamilton v. Snook, 281 U. S. 66, the court held that the state might exempt altogether vehicles weighing less than 3,000 pounds, although their loaded weight may be much more than vehicles not exempt.

The court said that the tax might be laid upon vehicles according to their propensities to injure or destroy the highways, "and may exempt those with respect to which this tendency is slight or non-existent." And in Bekins Van Lines v. Riley, 280 U. S. 80, the court sustained a statute directed at common carriers alone, on the ground that their use of the highways would be regular and frequent and expose the public to dangers exceeding those consequent upon the occasional movements of other carriers. Alward v. Johnson, 282 U. S. 509, is to the same effect. We think the legislature had a right to take into consideration the fact that as business is now conducted, the transportation [fol. 39] of livestock and farm products to market by the owners occasions but a casual and infrequent use of the highways, while the transportation of the finished product to the ultimate consumer is accomplished generally by the sellers, and that their use of such highways is habitual and constant.

When the legislature acts within the scope of its legislative power, when no facts are disclosed as to the reasons which actuated the legislation, the presumption of constitutionality stands unless no fair reason can be ascribed for the legislative action. Hardware Dealers Ins. Co. v. Glidden,—U. S.—(Decided November 23, 1931); O'Gorman v. Hartford Ins. Co., 282 U. S. 251; Standard Oil Co. v. Marysville, 279 U. S. 582. That a legislative classification should stand, "if any state of facts reasonably can be conceived that would sustain it"; that the burden is on the assailant to show that the classification is "essentially arbitrary"; that the legislature has a "wide scope of discretion" in classification; that "mathematical nicety" is not required, and that "some inequality in practice" is not fatal, see Lindsley v. Natural Carbonic Co., 220 U. S. 61, 78; Tax Commissioners v. Jackson, 283 U. S. 527, 537; Brown-Forman v. Kentucky, 217 U. S. 563, 573; Munn v. Illinois, 94 U. S. 113, 132. It is abundantly settled that the legislature may consider the difficulties of administration in the enactment of statutes. In Purity Extract Co. v. Lynch, 226 U. S. 192, it was held that the difficulties besetting the adminstration of a law was sufficient to authorize the placing of an innocent article within a proscribed class. See, also, Ruppert v. Caffey, 251 U. S. 264, 283; Hebe Co. v. Shaw, 248

U. S. 297, 303; Euclid v. Ambler Co., 272 U. S. 365, at page 389; Tyler v. United States, 281 U. S. 497, 505

[fol. 40] One reason for this exemption, and the exemption next discussed, immediately occurs to us. It is a matter of common knowledge that one of the most serious problems connected with legislation such as this is the problem of administration and the cost thereof. One of the reasons for exempting small incomes from taxation was the cost and expense of collection. If laws are placed upon statute books, they should be enforced. The problem of enforcing such statutes as the one now before us is not a simple one, and the cost of collection of the tax is an item that must be considered. It is a well known fact that business concerns, such as plaintiffs, keep books, and it is comparatively simple to ascertain the mileage of their trucks. A different problem is presented if an effort is made to require a record of the mileage of the trucks of farmers and others incidentally using the highways. It is undoubtedly true that it would require a veritable army of inspectors if a sincere effort was made to ascertain the mileage of every farmer's truck in Kansas. The cost of collection might exceed the tax. We are not prepared to say that the legislature, which presumably has considered all of these elements and has made a serious effort to meet this problem, has exceeded its powers in exempting such casual uses from the operation of this law.

A more troublesome question concerning exemptions is that provision which exempts private carriers "who operate within a radius of 25 miles beyond the corporate limits of such city." The plaintiffs urge that this is so uncertain and indefinite as to be entirely unenforceable, and present in support of that statement several interpretations which border on the fantastic, one of such interpretations being that if a private carrier starts on an un-

[fol. 41] interrupted journey across the state, that it passes through a series of exempt circles of 25 mile radii, and becomes exempt from taxes whenever it is within one of those circles, and taxable as soon as it passed without. The practical result of this construction would be to exempt all private carriers from tax, for it is quite doubtful whether there is any highway in Kansas that is not within 25 miles

of some city or village. Manifestly, the legislature did not intend that. "A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose." United States v. Ryan, — U. S. — (decided November 23, 1931); United States v. Katz, 271 U. S. 354. Counsel for the Public Service Commission suggests that the law means that a nonresident has a 25 mile exemption radius from the actual point of his entry in the State of Kansas, or from his established place of business in the state. We cannot agree entirely with this construction. Until we had the benefit of the ingenious argument of counsel for the plaintiffs, we had little doubt as to the actual intent of the legislature in enacting this exemption. The legislature very properly intended to exempt those vehicles which regularly and habitually operate within the limits of the city, such as the delivery trucks of the retail store. The legislature realized that around every city of the state there was a penumbra of town that was outside the city limits; that in their daily routine these city delivery trucks cross the city limits repeatedly in going back and forth into these outlying additions. In so doing, the trucks use the state improved highways but slightly, for the streets of these outlying additions are not generally a part of the state system. Furthermore, the practical difficulty of keeping track of the mileage of such delivery trucks as they cross back [fol. 42] and forth is well-nigh insuperable; the revenue to be gained from such use would be insignificant and the cost of collection large. The records disclose that when the bill was originally presented, its limit was fixed at three miles which would take in the outlying trade territory of most of the cities, although there are some that extend beyond that. There was some support for the flat 50 miles exemption contained in the North Carolina statute. The result was the compromise contained in this section.

We have little doubt of the power of the legislature to add to the city limits this twilight zone of trade territory both because of the problems of administration presented, and because of the fairness of it; and as long as residents and nonresidents are treated alike within this twilight zone, we think the legislature did not exceed its powers. In our

opinion the decision of the Supreme Court of the United States in Clarke v. Maxwell, 282 U. S. 811, is conclusive. That case involved the North Carolina statute which levied a tax on all carriers for hire which operated between fixed termini that were more than 50 miles apart. The plaintiff in that case was a carrier which operated between termini that were at times less than 50 miles apart, and at times more than 50 miles apart. He attacked the law on the ground that there was an aribitrary discrimination in favor of carriers who used the highways for less than 50 miles and as against those who used the highways for more than 50 miles; and made many of the same arguments that are presented here, to the effect that the wear and tear on the highways is quite as serious where a dozen trucks operated less than 50 miles as one truck that operated 55 miles. The Supreme Court of North Carolina sustained the tax, holding that since all were treated alike within and without the 50 mile zone, the legislature had a right to say that the [fol. 43] privilege of operating a truck for more than 50 miles was greater than the privilege of operating a truck for less than that distance; and that such a distinction was sufficient to support the classification. Clarke v. Maxwell, 197 N. C. 604. The Supreme Court of the United States affirmed without opinion. Clarke v. Maxwell, 282 U. S. 811. If the legislature has the power to exempt a class that uses the highways for less than 50 miles, it has a right to exempt a class that uses the highways within a radius of 25 miles. Both exempt a local use.

A case squarely in point is that of State v. Kozer, 116 Ore. 581, 242 Pac. 621, where the Oregon statute exempted vehicles which operated exclusively within the boundaries of incorporated cities or towns of the State of Oregon or within five miles beyond the boundaries of such cities or towns" and also exempted trucks "used exclusively in delivery to market of the products of husbandry by the grower and owner thereof." The same attack was made there as is made here. The Supreme Court of Oregon sustained the law saying that it was of course reasonable to exempt motor vehicles used only in cities, and as to the five mile radius said:

"Business houses are occasionally obliged to deliver articles of commerce to customers beyond corporate limits,

and the Legislature, in the exercise of its discretion, granted to this class the privilege of so using the highways beyond corporate limits within a limited radius. This concession is not unreasonable in view of the fact that our wonderful system of highways could not have been built nor maintained were it not for the thousands of owners of commercial vehicles whose places of business are in cities and who seldom use the highways, yet pay their just portion of this public burden."

Of course, 25 miles is further than 5 miles; and it does seem that a 25 mile exemption, even for facility of administration, is pretty far. But if the state has the power to create this penumbra about the city, the question of the dis-
[fol. 44] tance must be left to the legislature unless it is clearly arbitrary. The language of Justice Holmes, while in a dissenting opinion, is an apt statement of a familiar principle of law:

"When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark."

Louisville Gas Co. v. Coleman, 277 U. S. 32, 41.

A recent case that distinctly recognizes the propriety of a classification predicated upon difficulty of administration and accounting is Railway Companies v. Interstate Commerce Commission, — U. S. — (decided November 23, 1931). There railroads of less than 100 mile length were exempted from certain features of the Car-Rental order of the Interstate Commerce Commission; this exemption was sustained because it relieved the small carriers "from the burden of keeping account of a multitude of separate

per diem charges, and reporting them separately to the various trunk lines." It was noted that the longer lines maintained large accounting forces. So here, the bakeries keep books; the farmers do not. Long hauls are easily recorded, and the tax will pay for the inspection; but the burden of computing and collecting a tax from the delivery truck which occasionally crosses the city limits, is disproportionate to the tax involved.

[fol. 45] A Texas statute, approved June 11, 1931, regulated the length and width of trucks, but exempted implements of husbandry, well-drilling and highway construction machinery, trucks operating exclusively within a city, and all vehicles engaged in carrying property from the point of origin to the nearest common carrier loading point, and from such loading point to destination. These exemptions were assailed before the United States District Court of Texas, three judges sitting. The statute was construed by that court as exempting farm machinery only as it moved from field to field, and as so construed, sustained the validity of that and all other exemptions. The origin-to-common carrier exemption was sustained because of the short haul involved. Sproles v. Binford, 52 F. (2d) 730, 734. In 1887, the State of New York passed a statute prohibiting the use of stoves in passenger cars, but exempted railroads of less than 50 miles in length. The Supreme Court of the United States denied the contention that such exemption resulted in an arbitrary classification. New York, etc., Railroad v. New York, 165 U. S. 628.

While the act is primarily a taxing statute, it does contemplate regulations looking to the public safety. The exemption of the farmer from such regulations can be sustained on the familiar ground that he makes but casual use of the highways for transportation of his products. The 25 mile exemption is probably sustainable on the ground that the trucks exempted are domiciled in and generally use the city streets; indeed they must use them to get to the city limits; and such trucks are subject to the control of city authorities in these respects. Again, plaintiff's trucks are exempted within this zone as are all others like situated.

But it us urged that the statute is not susceptible of this construction; it is said that the statute exempts any carrier

[fol. 46] which operates within a radius of 25 miles beyond the city limits. We think that this phrase must be read in connection with the first phrase of the sentence. The first phrase exempts all carriers who operate wholly within the city limits; a distinction was then intended to be drawn in favor of private carriers who operated within the 25 mile zone outside of the city. So the phrase in question was inserted. It is also to be observed that the phrase uses the expression "within a radius." The use of the word "radius" indicates a center. That center must be the city. What city? The statute says "such city". "Such" refers back to motor carriers "who operate wholly within any city." We think a fair construction of the statute is that there is exempted private carriers who have an established place of business within a city, be they resident or nonresident, and who use that city as a center of the operations of that vehicle. The bill alleges that one of the nonresident corporations maintains bakeries in several cities of the state. Connected with those bakeries are delivery trucks. Such trucks may be said to be domiciled in that city. Such trucks may operate in and about that city, within a radius of 25 miles, exempt from the tax. Nor is it necessary that a carrier should have a bakery in the city. We are of the opinion that if a bakery were operated in Kansas City, Missouri, and domiciled trucks in the city of Topeka, for delivery in Topeka and environs, that the bread could be hauled from Kansas City, Missouri, to Topeka, by trucks (such trucks paying the tax) but that it could then be turned over to the domiciled trucks, which could deliver their bread in Topeka and within the 25 mile radius, exempt from the tax. Although the language is not entirely apt, we think it can and should be construed as intending to exempt from the tax those carriers who either have an established place of business or an established [fol. 47] delivery point, with trucks domiciled in any city, and that such trucks may operate in that city and within a 25 mile radius free of any tax; if such a truck goes beyond the 25 mile limit, we agree with the construction of the Commission, that only the excess is taxable. It is true that sometimes that excess would be difficult of ascertainment; but that is a legislative problem. It is our duty to construe the law so as to make it constitutional if it is

fairly susceptible of such a construction. So construed we believe the exemption not to be so arbitrary as to trespass upon the constitutional limitations. This conclusion is strongly buttressed by the fact that the nonresident plaintiffs are treated exactly like residents in that they may domicile a truck in any city and be entitled to the exemption.

The point urged by counsel for the plaintiffs that the 25 mile zone is larger around a large city than around a small city, is mathematically but not legally sound. The Supreme Court of the United States in Railway Company v. Interstate Commerce Commission, supra, met a similar argument by the simple statement that it is not enough to show that "mathematical accuracy in the adjustment of a burden may not be attained."

The next claim is that Section 5 of the Act, which is set forth in the margin,[1] imposes upon private carriers the [fol. 48] duties and obligations of common carriers. If this is true, the legislature has probably exceeded its power, although Circuit Judge Hutcheson, speaking for a three-judge court, may have otherwise held. Stevenson v. Binford, supra. But we do not so read Section 5. The first

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[1]Sec. 5. The public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers in this state and to fix and approve reasonable maximum or minimum or maximum and minimum rates, fares, charges, classifications and rules and regulations pertaining thereto. And the public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers, contract motor carrier of property or of passengers and private motor carrier of property in the state and to regulate and supervise the accounts, schedules, service and method of operation of same; to prescribe a uniform system and classification of accounts to be used; to require the filing of annual and other reports and any other data; and to supervise and regulate "public motor carriers of property or of passengers," "contract motor carriers of property or of passengers" and "private motor car-

sentence of Section 5 deals solely with public carriers and gives to the Commission the power to fix its rates. The second sentence deals with both the public and private carriers and gives the Commission power, not over rates or charges, but over their bookkeeping, and their relations to the traveling and shipping public. If this tax is to be collected, some books of account must be kept by the carriers that will reflect the mileage of their trucks. The legislature has power to authorize the Commission to require such bookkeeping and such reports as will accurately reflect the mileage of the trucks. It is not to be assumed that the Commission will go further than this, with reference to private carriers. If it does go further, the regulation, and not the statute, would be invalid. The same sentence refers to the "method of operations of same," and the last phrase authorizes the Commission to regulate the carriers in their relations with the traveling and shipping public. As far as private carriers are concerned at least, this power is limited to such regulations as will protect other [fol. 49] travelers and shippers on the highway, and protect the highways themselves. Under this power it can control, within reasonable limitations, the width, the length, the height, the weight, the speed, the lights, the brakes, on these large and speedy trucks which continually use the highways. Such regulations, and others that may occur to the Commission, are appropriate, for the protection of travelers and shippers who are also entitled to the use of the highways. So construed, the authority granted is well within the police powers of the state. The last sen-

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riers of property" in all matters affecting the relationship between such "public motor carriers of property or of passengers" "contract motor carriers of property or of passengers" and "private motor carriers of property" and the traveling and shipping public. The public service commission shall have power and authority by general order or otherwise to prescribe reasonable and necessary rules and regulations governing all such motor carriers. All laws relating to the powers, duties, authority and jurisdiction of the public service commission over common carriers are hereby made applicable to all such motor carriers except as herein otherwise specifically provided."

tence deals solely with common carriers and extends the laws relating to common carriers to "all such motor carriers," which by the simplest rules of grammatical construction, refers to public and not to private carriers.

It is claimed that Section 8 is invalid, in that it requires a private carrier to procure a license. Section 8 should be read in connection with Section 7, which forbids public carriers to operate an intrastate business without "a certificate of convenience and necessity." Section 8 deals with a license and not with a certificate of public convenience. It makes it mandatory upon the Commission to issue the license upon receipt of certain information and upon payment of the fees required. Every automobile driver in the state of Kansas must have a license. Such Section requires that—

"An application shall be made to the public service commission in writing stating the ownership, financial condition, equipment to be used and physical property of the applicant, and such other information as the commission may request."

The ownership and financial condition of the applicant is a matter of interest to the Commission in connection with the collection of the tax; the question of the equipment and physical property connected therewith is of interest to the Commission in the matter of public safety, particularly [fol. 50] with reference to the condition of steering gears and brakes. Until the Commission requires information which has no reasonable bearing on the ability of the applicant to pay the tax, or has no relation to the safety of his equipment, the plaintiff's rights have not been invaded.

The next section under attack is Section 21 which is copied in the margin.[2] This court, in Louis v. Boynton,

[2] Sec. 21. No certificate or license shall be issued by the public service commission to any "public motor carrier of property," "public motor carrier of passengers," "contract motor carrier of property or passengers" or "private motor carrier of property," until and after such applicant shall have filed with, and the same has been approved by, the public service commission, a liability

supra, construed this section as not requiring security for passengers or cargoes carried, but only to protect third persons from injuries to their persons or property. So construed, the section is clearly within the powers of the state. That no such bond is required of automobile owners generally is not arbitrary. Plaintiffs complain that the last sentence of Section 21 provides that no city shall require any additional bond. It seems to be fair to say that if one bond is given, another shall not be required. But plaintiffs are not hurt by this. They can give all the bonds they wish, without let or hindrance.

[fol. 51] The next section attacked is Section 22 which is in the margin.[3] This section deals in part with public

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insurance policy in some insurance company or association authorized to transact business in this state, in such reasonable sum as the commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier. No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state.

[3] Sec. 22. The Commission shall promulgate and publish in the official state paper, and mail to each holder of a certificate or license hereunder, such regulations as it may deem necessary to properly carry out the provisions and purposes of this act. The commission may at any time, for good cause, suspend, and, upon at least five days' notice to the grantee of any certificate and an opportunity to be heard, revoke or amend any certificate. Upon the commission finding that any public carrier does not give convenient, efficient and sufficient service as ordered, such public carrier shall be given a reasonable time to provide such service before any existing certificate is revoked or a new certificate granted. Any rules promulgated by the commission shall include: (a) Every vehicle unit shall be maintained in a safe and sanitary condition at all times. (b) Every operator of a motor vehicle used as a public

carriers and in part with all carriers. As far as private carriers are concerned it enables the Commission to promulgate rules which shall include the requirement that every truck shall be maintained in a safe and sanitary condition at all times. Certainly all trucks on the highway ought to be maintained in a safe condition, and the plaintiffs, hauling food stuffs, ought not to complain if their trucks are required to be kept in a sanitary condition. Operators of private carriers shall be 16 years of age, and shall be of good moral character, and fully competent to operate the truck. The age requirement is valid; the operators should be of good moral character at least to the extent [fol. 52] that they are not addicted to drink or opiates; and they should have enough character to stop and assist the injured in case of an accident. The Commission's power to regulate the hours of service is vital to the safe operation of trucks. A considerable percentage of accidents on the highway are occasioned by those who have driven so long that they have become sleepy or their senses have become numbed. It is not to be presumed that plaintiffs of the standing of these plaintiffs, dealing constantly with the public, would want to equip their trucks with drunken drivers, or to press them to such long hours of service that their faculties have become dulled. Neither is it to be presumed that the Commission will make any require-

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carrier shall be at least twenty-one years of age; and every operator of other carriers to which this act applies shall be at least sixteen years of age; and all such operators shall be of good moral character and duly competent to operate the motor vehicle under his charge. (c) Hours of service for operators of all motor carriers to which this act applies shall be fixed by the commission. (d) Accidents arising from or in connection with the operation of carriers shall be reported to the commission in such detail, and in such manner as the commission may require; *Provided*, That the failure to report any such accident within five days after the happend ing thereof shall be deemed willful refusal to obey and comply with a rule of the commission. (e) The commission shall require and every carrier shall have attached to each unit or vehicle such distinctive marking as shall be adopted by the commission.

ments as to character, or any requirements as to hours of service, that do not have a direct relation to the safety of the operation of the vehicle. If the Commission does make some such regulation, the regulation would be invalid, and not the statute; and unless the plaintiffs desire to employ drunken or hit-and-run drivers, or unless the plaintiffs want to work them so long that their senses are dulled, the plaintiffs are not hurt. We think that Section 22 has a direct bearing upon the safety of the highways and is within the power of the state.

The plaintiffs rely principally upon Smith v. Cahoon, supra. That was an appeal from the Supreme Court of Florida, which had denied a writ of habeas corpus to the appellant. The appellant had been arrested for operating a truck without a license. The statute undertook to exempt such public carriers as were engaged in the transportation of agricultural, horticultural and piscatorial products. To thus distinguish between two public carriers, each of which is engaged in the transportation for hire, and each of which was a habitual and continual user of the highway, on account of the nature of the product carried, was held to be [fol. 53] unconstitutional. Moreover, the statute contained provisions which could only be legally applicable to common carriers, and other provisions which could be applicable to all carriers, but these provisions intermingled. When the appellant was arrested, the statute had not been construed. The question to be determined was whether or not the appellant could be restrained of his liberty for violating the statute, the terms of which were obscure, and which had not been construed by the courts. He was released. But the Supreme Court stated, "It should be observed that this is not an action in equity where the enforcement of the statute awaits the final determination of the court as to validity and scope." The present case is such an action. The Supreme Court further said that "but until such separation has been accomplished by judicial decision" the statute remained uncertain. But the provisions of the Kansas statute are not so hopelessly intermingled as the Florida statute; and in the second place, the statute has now been construed and nobody is deprived of his liberty. We do not believe that the Cahoon Case controls this case.

Finally it is urged that the statute is in conflict with the Interstate Commerce clause of the constitution. As to private carriers, no discrimination is made between those engaged in intrastate and those engaged in interstate commerce. It has been repeatedly held, in the cases heretofore cited, that the exaction of a fair compensation for the use of the highways of the state, and the enforcement of reasonable measures looking toward the safety of the public on such highways, is not an undue interference with interstate commerce.

The argument of plaintiffs, particularly as to the 25 mile exemption, is logically strong, although we do not see how it works any real discrimination against them, since all within the zone are treated alike. The real objection of [fol. 54] the plaintiffs is to the payment of the tax; but the tax is reasonable in amount, and those who, like plaintiffs, constantly use the highways as an adjunct to their business, ought to pay their share of maintenance. The question of constitutionality of this statute is not free from doubt; but the rule is as settled as it is sound, that in case of doubt, the statute should be upheld.

It follows that the bill should be dismissed and the temporary restraining order heretofore issued should be dissolved. If the plaintiffs desire to appeal, a stay of this order will be granted for a reasonable time in which to perfect the appeal, and until the appeal is determined, provided that the plaintiffs keep and furnish to the Commission a record of the mileage of their trucks subject to taxation, and either pay the taxes under protest, or give a bond to be approved by the Clerk of this court in sufficient amount to insure the payment of such taxes if this decision is affirmed. It is so ordered.

IN UNITED STATES DISTRICT COURT

Dissenting Opinion—Filed Dec. 15, 1931

KENNAMER, District Judge, dissenting:

I concur in the opinion of the majority in so far as the same construes the Kansas Highway Act that the statute

has as its purposes the regulation of the highways and taxation.

I dissent from the views expressed by the majority sustaining the constitutionality of the act. The exemption of motor carriers who operate within radius of twenty five miles beyond corporate limits of any village or city is an unreasonable discrimination in favor of such operators. The necessity for the protection of the public on the highways within radius of twenty five miles is just as great or greater as beyond such radius as the probabilities of damage to persons or property would be more likely than beyond such radius. The case of Smith vs. Cahoon, 283 U. S. 553, seems to me to be controlling.

[File endorsement omitted.]

[fol. 55] IN UNITED STATES DISTRICT COURT

DECREE—Filed Jan. 6, 1932

This cause coming on to be heard before a statutory court of three judges, after due consideration, and being fully advised in the premises, it is by the Court ordered, adjudged and decreed that the bill of complaint herein be and the same is hereby dismissed at petitioners' cost, and the temporary restraining order heretofore issued be hereby dissolved.

George T. McDermott, Cicuit Judge. F. E. Kennamer, District Judge. Richard J. Hopkins, District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed Jan. 9, 1932

PETITION FOR APPEAL

To the Honorable District Court of the United States for the District Court of Kansas, First Division:

Considering themselves aggrieved by the decision of the District Court of the United States for the District of Kan-

sas, First Division, the petitioners therein, Continental Baking Company, a corporation, General Baking Company, a corporation, Schulze Baking Company, a corporation, and Carl Wilke, doing business as the Wilke Baking Company, hereby pray that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the appeal bond thereon; that the amount of the appeal bond be fixed for costs and also for supersedeas.

[fol. 56] ASSIGNMENT OF ERRORS

And the said petitioners, Continental Baking Company, a corporation, General Baking Company, a corporation, Schulze Baking Company, a corporation, and Carl Wilke, doing busines as the Wilke Baking Company, assign the following errors in the record and proceedings in the said case:

1. The District Court of the United States for the District of Kansas, First Division, erred in sustaining defendants' motion to dismiss and dismissing petitioners' bill of complaint in the above entitled cause.

2. The District Court of the United States for the District of Kansas, First Division, erred in refusing petitioners the relief prayed for in their bill of complaint, in refusing petitioners the injunction prayed for, and in dissolving petitioners' temporary restraining order.

3. The District Court of the United States for the District of Kansas, First Division, erred in the memorandum of opinion of the Honorable George T. McDermott, Circuit Judge, and the Honorable Richard J. Hopkins, District Judge, declaring Chapter 236 of the Laws of Kansas, 1931, constitutional when the provisions of the said act violate the due process and equal protection clauses of the Fourteenth Amendment, Article I, Section 8, Clause 3, and Article IV, Section 2 of the Constitution of the United States, and the law as last declared by the Supreme Court of the United States in Smith vs Cahoon, 283 U. S. 553.

4. The District Court of the United States for the District of Kansas, First Division, erred in not accepting the dissenting opinion of the Honorable Franklin E. Kennamer,

District Judge, as declaratory of the law controlling in this case.

5. The District Court of the United States for the District of Kansas, First Division, erred in holding that Chapter 236 of the Laws of Kansas of 1931, was valid and did not violate Section I of the Fourteenth Amendment to the [fol. 57] Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States.

6. The District Court of the United States for the District of Kansas, First Division, erred in holding that the exemption from the effect of said act of "motor carriers who shall operate wholly within any city or village of this State" in Section 2 of Chapter 236 of the Laws of Kansas, 1931, was not arbitrary, discriminatory and void in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared by the Supreme Court of the United States in Smith vs. Cahoon, supra.

7. The District Court of the United States for the District of Kansas, First Division, erred in holding that the exemption from the effect of said Act of private motor carriers "who operate within a radius of 25 miles beyond the corporate limits of such city or any village," in Section 2 of Chapter 236 of the Laws of Kansas of 1931, was not arbitrary, discriminatory and void, and in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared by the Supreme Court of the United States in Smith vs. Cahoon, supra.

8. The District Court of the United States for the District of Kansas, First Division, erred in holding that the

exemption from the effect of said act of private motor carriers "in the transportation of live stock and farm products to market by the owner thereof or supplies for [fol. 58] his own use in his own motor vehicle," was valid and did not violate Section I of the Fourteenth Amendment to the Consitution of the United States in depriving petitioners of this property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared in Smith vs. Cahoon, supra.

9. The District Court of the United States for the District of Kansas, First Division, erred in holding Chapter 236 of the Laws of Kansas, 1931, was valid and not unconstitutional in failing to expressly distinguish the provisions properly applicable to the various carriers classified as private motor carriers of property, and was therefore not void for uncertainty.

10. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 5 of Chapter 236 of the Laws of Kansas, 1931, was valid and did not violate Section I of the Fourteenth amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared by the Supreme Court of the United States in the case of Smith v. Cahoon, supra.

11. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 5 of Chapter 236 of the Laws of Kansas, 1931, did not subject such private motor carriers of property to the same regulations imposed on common carriers, and was not unconstitutional and void, and beyond the power of the State of Kansas, and was not in conflict with the decision of the Supreme Court of the United States in the case of Smith vs. Cahoon, supra.

[fol. 59] 12. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 5 of Chapter 236 of the Laws of Kansas, 1931, did not give to the Public Service Commission of the State of Kansas powers in excess of those authorized by the Constitution of the United States, and particularly the Fourteenth Amendement thereto, and in conflict with the decision of the Supreme Court of the United States in the case of Smith vs. Cahoon, supra, with respect to private motor carriers of property, and in holding that the provision of said act making "All laws relating to the powers, duties, authority and jurisdiction of the Public Service Commission over common carriers are hereby made applicable to all such motor carriers except as herein otherwise specifically provided," did not give to the Public Service Commission the right and authority to require private motor carriers to become subject to the regulations and responsibilities of public carriers, which are beyond the power of the State.

13. The District Court of the United States for the District of Kansas, First Division, erred in holding Sections 8, 15, 16, 17, 19, and 23 of Chapter 236 of the Laws of Kansas of 1931, were valid and did not give to the Public Service Commission of the State of Kansas powers over private motor carriers of property in excess of those authorized by the Constitution of the United States, and particularly the Fourteenth Amendment thereto, and not in conflict with the decision of the Supreme Court of the United States in the case of Smith vs. Cahoon, supra.

14. The District Court of the United States for the District of Kansas, First Division, erred in holding that the provisions of Chapter 236 of the Laws of Kansas, 1931, exempting the carriers set forth in Section 2 of said act from the provisions of Section 21 of said act requiring a "liability insurance policy in some insurance company or association authorized to transact business in this State, in such reasonable sum as the Commission may deem necessary to adequately protect the interests of the public [fol. 60] with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property re-

sulting from the negligent operation of such carrier," was not arbitrary, discriminatory and void, and not in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared by the Supreme Court of the United States in Smith vs. Cahoon, supra.

15. The District Court of the United States for the District of Kansas, First Division, erred in holding that "No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state", as provided in Section 21 of Chapter 236 of the Laws of Kansas of 1931, was not arbitrary, discriminatory and void, and in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and not in conflict with the law as last declared by the Supreme Court of the United States in the case of Smith vs. Cahoon, supra.

16. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 22 of Chapter 236 of the Laws of Kansas, 1931, did not subject such private motor carriers of property to the same regulations imposed on common carriers, and was not unconstitutional and void, and beyond the power of the State of Kansas, and was not in conflict with the law as last declared by the Supreme Court of the United States in Smith vs. Cahoon, supra.

[fol. 61] 17. The District Court of the United States for the District of Kansas, First Division, erred in holding that Chapter 236 of the Laws of Kansas of 1931, did not conflict with and is not repugnant to Article I, Section 8, Par. 3, of the Constitution of the United States delegating to Congress the exclusive power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

PRAYER FOR REVERSAL

For which errors the petitioners, Continental Baking Company, a corporation, General Baking Company, a corporation, Schulze Baking Company, a corporation, and Carl Wilke, doing business *and* the Wilke Baking Company, pray that said judgment and decree of the District Court of the United States for the District of Kansas, First Division, dated January 6th, 1932, in the above entitled cause be reversed and a judgment rendered in favor of said petitioners and for costs.

R. L. Stephens, Charles R. Wilke, John C. Grover,
Counsel for Appellants.

Received copy of the foregoing Petition for Appeal, Assignment of Errors, and Prayer for Reversal this 9th day of January, 1932.

Harry H. Woodring, as Governor of the State of Kansas; Roland Boynton, as Attorney General of the State of Kansas; Jesse W. Greenleaf, Thurman Hill, and Charles W. Campbell, as Members of the Public Service Commission of the State of Kansas, by Roland Boynton, Walter T. Griffin, Chas. W. Steiger, Earl H. Hatcher, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Jan. 9, 1932

The Appellants in the above entitled suit, and each of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment and decree made and entered in the above entitled suit by the District Court of the United States for the District of Kansas, First Division, on the 6th day of January, 1932, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided.

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United

States from the District Court of the United States for the District of Kansas, First Division, in this cause, as provided by law, and it is further ordered that the Clerk of the Court appealed from shall prepare and certify a transcript of the record, proceedings, judgment and decree in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of $5000.00 and that bond be given therefore, and that said bond when approved and filed shall serve as a supersedeas.

Geo. T. McDermott, Circuit Judge. F. E. Kennamer, District Judge. Richard J. Hopkins, District Judge.

Dated January 9, 1932.

[File endorsement omitted.]

[fols. 63-65] Supersedeas bond on appeal for $5,000, approved and filed Jan. 9, 1932, omitted in printing.

[fol. 66] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Jan. 9, 1932

To the Honorable F. L. Campbell, Clerk District Court of the United States for the District of Kansas, First Division:

In the certified transcript of the record in the above entitled cause to be made and transmitted to the Supreme Court of the United States pursuant to an order allowing appeal, dated January 9th, 1932, signed by the Honorable George T. McDermott, Circuit Judge, kindly incorporate the following:

1. Bill of Complaint for injunction filed by petitioners, (appellants here) in the District Court of the United States for the District of Kansas, First Division:

2. Exhibit "A" attached to bill of complaint filed by petitioners, being a copy of Chapter 236 of the Laws of Kansas, 1931;

3. Temporary restraining order issued by the Honorable Richard J. Hopkins, District Judge;
4. Bond on temporary restraining order;
5. Motion to dismiss filed by defendants;
6. Request for convening of three-judge Court, filed by defendants;
7. Petitioners consent to request for convening of three-judge Court;
8. Order designating judges and fixing date of hearing of three-judge Court;
9. Notices of hearing filed by petitioners and defendants;
10. Order of Court on hearing;
11. Memorandum opinion of the District Court filed December 15, 1931;
12. Dissenting opinion of the Honorable Franklin E. Kennamer, District Judge, filed December 15, 1931;
13. Final decree or order of Court dismissing cause at cost of petitioners;
[fol. 67] 14. Appelants' petition for appeal to the United States Supreme Court, assignment of errors, and prayer for reversal;
15. Order allowing appeal;
16. Copy of bond on appeal;
17. Citation to appellees, with return thereon;
18. This Præcipe;
19. All Journal entries in their proper order.

R. L. Stephens, Charles R. Wilke, John C. Grover, Attorneys for Appellants (Petitioners).

Received copy of foregoing Præcipe this 9th day of January, 1932.

Harry H. Woodring, as Governor of the State of Kansas; Roland Boynton, as Attorney General of the State of Kansas; Jesse W. Greenleaf, Thurman Hill, and Charles W. Campbell, as Members of the Public Service Commission of the State of Kansas, Appellees (Defendants), by Roland Boynton, Walter T. Griffin, Earl H. Hatcher, Charles W. Steiger, Attorneys for Appellees (Defendants).

[File endorsement omitted.]

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

[fols. 69 & 70] STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Feb. 6, 1932.

Come now the appellants and adopt their assignments of error as their statement of the points to be relied upon, and represent that the whole of the record, as filed, is necessary for the consideration of the case.

Charles R. Wilke, John C. Grover, Counsel for Appellants.

Service of copy of the above notice is hereby acknowledged this 3rd day of Febuary, 1932.

Harry H. Woodring, as Governor of the State of Kansas; Roland Boynton, as Attorney General of the State of Kansas; Jesse W. Greenleaf, Thurman Hill, and Charles W. Campbell, as members of the Public Service Commission of the State of Kansas, by Roland Boynton, Walter T. Griffin, Charles W. Steiger, Earl H. Hatcher, Counsel for Appellees.

[fol. 71] [File endorsement omitted.]

Endorsed on cover: File No. 36,491. Kansas D. C. U. S. Term No. 677. Continental Baking Company, General Baking Company, Schulze Baking Company, et al., appellants, vs. Harry H. Woodring, as Governor of the State of Kansas, et al., etc., et al. Filed February 3, 1932. File No. 36,491.